AOL has the wrong approach; as explained by Netscape, the solution is not to expand the information services subject to universal service support, *but to exclude them all.* Netscape agrees that the Joint Board's "minimal content" approach "has no meaningful definition in the Internet environment or obvious application to the functionalities and services available today from Internet Service Providers ("ISPs") and Online Service Providers ("OSPs"). Netscape at 6.

b) An Explicit Subsidy For Telecommunications Services Used With Internet Access Would Be Appropriate

Netscape states that "a far better approach" is to differentiate the transport function from the enhanced function, and allow schools and libraries to secure only the former at discounted rates. Netscape states:

> Under this approach, any provider *offering dedicated transport facilities* (T-1, 56 Kbps, frame relay, etc.) linking a user to the Internet would be considered, to that extent, to be *providing 'telecommunications services' subject to discount* under Section 254(h). *At the same time, no discounts would be provided for Internet 'subscriptions,'* regardless of content origination, because those aspects of Internet services are *clearly enhanced.* Netscape at 6 (emphasis added).

Netscape's approach appears in some ways to be similar to Pacific's.[19] If the Commission decides to employ the universal service fund to encourage schools and libraries to use the Internet, it is important that the Commission do so by limiting funding to *telecommunications services* involved in that use. With regard to use of the Internet and on-line services, schools and libraries make two types of purchases. *First*, they purchase telecommunications services from a telecommunications carrier. *Second*, they purchase information services from ISPs (both independent ISPs and ISPs owned by telecommunications carriers). The information service is an ISP's package of services that includes both (a) underlying basic network services that the ISPs purchase from telecommunications carriers to

[19] Pacific at 41-44.

connect the ISPs' equipment to the telecommunications network so that their customers can reach them, and (b) a suite of enhanced services which are commonly viewed as Internet Access.

A school's or library's purchase of telecommunications service from a telecommunications carrier to connect the school's or library's equipment to the telecommunications network for the purpose of reaching the ISP could be made at discounted prices that are directly supported by the universal service fund, thus providing much of the benefit that the Joint Board intended. A school's or library's purchase of an information service package from an ISP could not legally be directly supported by the fund.

The underlying basic network services in the information service package, however, could be directly supported, so long as the *telecommunications service provider*, not the ISP, receives the support. Prices for many of those underlying services currently receive implicit support through the ESP exemption from access charges, as explained in our comments. If that subsidy is retained, it should be made explicit, with telecommunications service providers receiving support from the fund for the discounts they provide to the ISPs. The amount of the support would be calculated based on the payments the ISPs would have made if they paid access charges, minus what they are actually paying because of the ESP exemption (*i.e.*, rates for local business services). Both independent ISPs and ISPs owned by carriers would benefit from the discount in a competitively and technologically neutral manner. Competition should ensure that the ISPs pass the discounts on to schools and libraries, providing yet more of the benefit that the Joint Board intended.

In considering this approach, it is important to recognize that a provider of service can be both a telecommunications service provider and an ISP. To the extent that an ISP provides its own telecommunications services to customers, it is a telecommunications carrier that is required to pay into the fund and is eligible to receive payments from the fund. As Netscape explains, competitive and technological neutrality requires that all who are eligible to receive funds must contribute to the fund. Netscape at 7.

Netscape, however, incorrectly argues that payments into and out of the fund should not be limited to telecommunications carriers. Netscape appears to argue that an ISP should be eligible to pay and receive funds for the telecommunications services it purchases from a carrier and repackages. Netscape is wrong. It is the underlying provider of the telecommunications service to the ISP that is the provider of the telecommunications service, not the ISP that purchases telecommunications services from a carrier and packages them as interconnection and transport for the information service. Merely including interconnection and transport in their information services, does not make ISPs providers of telecommunications services. If it did, ISPs would be treated as common carriers under the Act.[20] Thus, Netscape's proposal would destroy the ability of ISPs to provide a fully unregulated information service that is interconnected to the network. If the Commission incorrectly viewed the ISP as the provider of the telecommunications services, under the Act not only would ISPs have to pay into the universal service fund and be eligible to receive funds, but the Commission would have to regulate the prices, terms, and conditions of ISPs' services. The Commission correctly has never taken this position.

[20] Any provider of telecommunications services (except an aggregator as defined in Section 226 concerning operator services) is a telecommunications carrier and "shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services . . . ." 47 U.S.C. § 153(44).

c) Competitive Neutrality Requires That No Internet Access Provider Receives Funding For Providing Internet Access Service, Regardless Of Whether Or Not The Provider Is Also A Telecommunications Carrier

Some other parties that support allowing ISPs to be eligible for payments from the fund similarly misconstrue the meaning of competitive neutrality in an attempt to support their position. The Internet Consumers (at 7), ITI (at 6), and CIX (at 5) argue that allowing carrier providers, but not non-carrier providers, of Internet access to obtain payments would give the carrier providers a competitive advantage.

The answer to all these parties is that no Internet access provider should receive funding for the provision of Internet access service, regardless of whether or not that provider is also a telecommunications carrier. These parties misconstrue the relationship between "telecommunications services" and "information services," including Internet access services, provided by a company that is both a telecommunications carrier and an ISP. For instance, Pacific Bell is a telecommunications carrier, providing telecommunications services. Pacific Bell also owns Pacific Bell Internet Services ("PBI"), an ISP. PBI obtains telecommunications services from Pacific Bell at the same tariffed rates, terms, and conditions that are available to all other ISPs. Like other ISPs, PBI packages those telecommunications services together with enhanced service functionality and offers a subscription service to customers. PBI, like other ISPs, should *not* receive any support from the universal service fund for any discounts on its subscription service. This approach is competitively neutral, with all ISPs treated the same and able to compete fairly for the business of schools and libraries.

d) The ESP Exemption Already Improperly Reduces Funds Needed For Network Services Used By ISPs

The approach we recommend will result in the service providers who are eligible to receive funds being treated the same as the service providers who support the fund. CIX attempts to avoid the need for this symmetry by asserting that "under the Joint Board's recommended plan, ISPs will support the proposed universal service fund as end-users of underlying telecommunications services that contribute significant revenues to the cost support mechanisms." CIX at 2. As explained in our comments, however, because of the ESP exemption from access charges, ISPs' payments for the underlying telecommunications services do not nearly cover the costs that ISPs cause, let alone provide additional support. Pacific at 41-44.

The ESP exemption provides CIX's members and other ISPs with discounts funded by the LECs. Providing these ISPs with yet more discounts funded by LECs and other telecommunications carriers would not only be illegal in the ways described in our comments, but would further deplete the funds available for carriers to develop the network and the telecommunications services needed by ISPs to bring information services to all Americans. As the Internet Consumers state, "policies which provide incentives to companies to provide discounted products at, or below, cost, or in-kind contributions, rather than policies which are punitive in nature, would be much more productive towards advancing universal service. . . ." Internet Consumers at 12.

Contrary to these goals, the ESP exemption is punitive in nature and discourages investment in the new technologies needed to benefit consumers. The Commission should remove the ESP exemption in its order that will result from its *Access Reform NPRM*. To the extent that the Commission may want to continue to subsidize the telecommunications services purchased by the ISP industry, and increase subsidies related to schools and libraries, the Commission should do so through *explicit* subsidies to telecommunications carriers who provide the discounts. This approach will be fair to all competitors and will benefit consumers.

B. The LCP Should Not Be Based on Dissimilar Services or TSLRIC, Rates Charged to Other Schools and Libraries, Or Promotional Rates, and Should Not Be Defined Broadly

1. The LCP Should Not Be Based on Rates to Dissimilar Customers for Dissimilar Services, or on Below-Cost Prices

We disagree strongly with the proposals of the Education and Library Networks Coalition ("EDLINC") and MCI that the "lowest corresponding price" or other pre-discount price should be set at a level that is either below cost, or based on prices paid by *dissimilar* customers for *dissimilar services.* These positions are directly contrary to the Joint Board recommendation that the LCP be based on amounts charged "*similarly* situated non-residential customers" for "*similar* services," and on Section 254's requirement that the pre-discount rate be based on the "amounts charged for similar services . . . ." 47 U.S.C. § 254(h)(1)(B).

EDLINC alternately supports using as the LCP 1) a national benchmark price (which ignores cost differences around the country), 2) the "lowest *commercially available* rate" (which ignores cost differences within a carrier's service area), and 3) an LCP where the only relevant factor in determining which rates are for "similarly situated" customers with "similar services" is the *volume of usage* (which ignores other factors that distinguish customers and services). EDLINC at 6, 9. We disagree with each of EDLINC's positions; the pre-discount price should be based on the amounts charged "similarly situated non-residential customers" for "similar services," as the Joint Board requires. Contrary to EDLINC's view, this formulation may give rise to regional differences that cause the LCP to differ within a carrier's service area.

Similarly, MCI proposes -- contrary to Section 254(h)(1)(B)'s requirement that the pre-discount rate be based on the "amounts *charged*" for similar services -- to set the pre-discount price at TSLRIC. MCI at 17. The "amounts charged" language of the Act reflects Congress' intent for pre-discount prices to be based on *actual market prices* rather than theoretical pricing constructs. We join with others in urging the Commission to reject, as the Joint Board did, the use of TSLRIC, TELRIC, or any other cost-based methodology for the purpose of determining the pre-discount price. *See* USTA at 37-38, Rural Telephone Coalition at 38.

2. The LCP Should Not Be Based on Prices Charged Other Schools and Libraries or Special Promotional Rates

Inherent in the LCP concept is a risk that it will require a carrier to offer in perpetuity a special promotional rate, or the rate the carrier charges other schools and libraries, even if the carrier's costs increase. If, for example, a promotional rate for a particular service is $100, a similarly situated school that desires a similar service could argue that it should also pay $100. Even after the promotion ends, other similarly situated schools desiring similar services may also wish to pay $100 (based on what the first school pays), even though the promotional rate that originally set the rate at $100 has long expired. This scenario could continue perpetually, even if the carrier's costs and other rates have increased.

One way to avoid this problem is BellSouth's proposal that the LCP should not be based on prices charged other schools and libraries. BellSouth at 33. Moreover, the LCP should not be based on short-term promotional rates. *Id.* *See also* Citizens Utilities at 17-18 (arguing against basing the LCP on existing *below cost* rates negotiated to settle an earnings investigation). We are open to other suggestions as to how to remedy this obvious defect in the LCP as it is currently formulated.

3. The LCP Should Not Be Broadly Defined

Finally, some commenters appropriately point out the need for clarification of the LCP. WinStar, for example, suggests that requiring carriers to *certify* that they are offering their LCP will give rise to numerous complaints before the Commission about whether a price truly is the LCP. WinStar at 11. We believe WinStar's concern best can be addressed, and the potential for complaints reduced, by clarifying that the terms "similarly situated nonresidential customers" and "similar services" should not be so broadly defined as to group together those whose situations are more than marginally different. *See* American Library Ass'n at 14 ("differences in situation should be limited to those factors that *demonstrably* and *significantly* impact the direct cost of providing a service in one area versus another and/or one customer versus another.").

C. Schools and Libraries Should Not Be Required to Re-Bid Existing Contracts

We disagree with commenters who advocate rebidding of all existing contracts. *E.g.*, Ass'n for Local Telephone Service at 15, Cox at 12, Teleport at 8. Forcing schools and libraries to re-bid all existing contracts is inappropriate, and perhaps even antithetical to the intent of this entire proceeding (*i.e.*, to secure reduced pricing for telecommunications services). EDLINC agrees. EDLINC at 19 (urging Commission to allow schools and libraries to retain "negotiated contract rates" and subtract the discount from those rates).

Competitive bidding processes are both time intensive and expensive. Requiring schools and libraries to undertake such processes when they are neither planned nor budgeted would offset much of the savings they might gain in reduced pricing. There is no guarantee that a new bidding process would produce rates that are even as low as the ones currently in effect, particularly if the current rate is the product of a long-term agreement that has protected the schools and libraries from rate increases. Finally, if the Commission were to mandate a "fresh look" process that exempted schools and libraries from premature termination charges or breach of contract liability, this process could have a confiscatory effect on service providers who have not yet recovered costs (such as the cost of installation) amortized for pricing purposes over the length of the agreement.

Thus, the Commission should allow schools and libraries the right to retain existing rates, regardless of whether they were obtained by way of competitive bid. If schools and libraries opt to re-bid their contracts, they should be required to remit to the original provider any out-of-pocket costs, such as installation costs, the provider has not yet recovered.

IX. HEALTH CARE

A. The Commission Should Give Carriers Flexibility in Determining the Appropriate Services to Furnish to Health Care Providers

Pacific advocated ISDN speeds for health care providers because of the great successes in California programs using the service. Pacific at 54-55; *see also* American Telemedicine Ass'n ("ATA") at 2 (suggesting ISDN or something less than T-1 may be adequate). In California -- a national leader in introducing technology into the health care environment -- the telemedicine projects are using predominantly ISDN speed and some fractional T-1, with the exception of leading academic institutions experimenting with ATM Cell Relay for research purposes.[21]

Other carriers, on the other hand, may find it more cost effective to offer health care providers up to T-1 speeds. *See, e.g.,* Ameritech at 24-25, SBC at 10. Thus, we propose that carriers have a *choice* in determining the level of services they deploy to health care providers. If, as in Pacific's case, the carrier can demonstrate that a slower speed or less robust capacity, such as ISDN, meets the needs of the provider, then it should be allowed to provide this service. If, on the other hand,

[21] We plan to file *ex parte* comments detailing some of the California telemedicine projects' successes using ISDN technology and other services that operate at far less than T-1 speeds.

it makes more economic sense for a carrier to deploy faster lines, such as T-1 lines, the carrier should have this option, so long as the health care provider's real technological needs are met.

None of the foregoing discussion should be construed to mean we support network build-outs -- we do not. *See also* AT&T at 25-26, BellSouth at 44, USWest at 49-50, SBC at 11. However, if the Commission orders build-outs, it should leave a great deal of discretion to the carrier as to the level of services built out, given the financial strain on the fund that build-outs would cause. *See* Ameritech at 27. And the Commission should not, under any circumstance, require overbuilds; where network facilities already exist, second facilities-based providers should not be required to serve health care providers.

B. Equalizing Health Care "Rates" Does Not Require Equalizing Distance Sensitive Charges

We disagree with the commenters who advocate equalizing the distance-sensitive charges that health care providers pay. *E.g.,* U.S. Dep't of Health and Human Services at 6, ATA at 3. As several commenters urge, equalizing distance-sensitive charges is beyond the scope of the statute, and should not be required. Ameritech at 25-26 (citing Section 254(g)'s reference to "rates" and not distance charges), USTA at 40, BellSouth at 42-43, SBC at 11. For the same reason, the Commission should not equalize charges paid by rural health care providers to reach the Internet, as the American Telemedicine Association advocates. ATA at 4-5; *but see* Ameritech at 26, Bell South at 43, USTA at 40, and WorldCom at 32 (opposing toll free Internet services for health care providers).

Some of the ATA's proposals, however, merit further consideration: it advocates auctions for the establishment of local Internet POPs throughout the country and the creation of incentives for local exchange carriers to provide Internet access to rural providers. ATA at 4-5. Because we believe requiring toll free Internet access will be a disincentive for Internet Service

Providers to locate servers in rural areas, we support actions to encourage deployment of services so that rural users can reach the Internet by way of a local call. Both of the ATA's suggestions may encourage the market to move in this direction.

X. THE COMMISSION SHOULD APPOINT NECA AS THE INTERIM ADMINISTRATOR OF THE SCHOOLS, LIBRARIES AND HEALTH CARE FUNDS

We support NECA as the interim administrator of the schools, libraries and health care funds, and ask the Commission to make this appointment before its May 1997 deadline so the work necessary to establish the fund can begin as soon as possible. *See also* EDLINC at 19, ALA at 15 (not opposing NECA so long as representation is diverse). We understand that NECA plans to carry out this activity using a specially-formed independent subsidiary; as a result, any concerns regarding NECA's suitability as interim administrator will be alleviated.

XI. ACCESS TO EQUIPMENT FOR THE DEAF AND DISABLED

Pacific is concerned that the issue of access to currently available telecommunications equipment for the deaf and disabled may not be fully dealt with in the Commission's proceeding to implement Section 255 of the Act.[22] That proceeding appears to be focused on access to new products and services, rather than on distribution programs for existing equipment and services such as TTYs, amplified telephones, and artificial larynxes. We believe the Commission would do well to review and address the issue of programs that distribute such equipment. State programs vary drastically, and the lack of consistent programs and services appears to be out of sync with the universal service principles

[22] *Implementation of Section 255 of the Telecommunications Act of 1996, Access to telecommunications Services, Telecommunications Equipment, and Customer Premises Equipment by Persons With Disabilities,* CC Docket No. 96-198. *See Joint Board Recommendation,* ¶ 24 (opining that issue of access to telecommunications equipment and services by people with disabilities will be taken up in the rulemaking implementing Section 255) & ¶¶ 18, 390.

embodied in Section 254. Therefore, we propose that the Commission study the states with enlightened equipment distribution programs, such as California, Massachusetts and New York -- programs which, we might add, work effectively *without federal funding* -- and adopt guidelines for the states based on programs in states such as these.[23]

XII. CONCLUSION

The most important issue the Commission has before it in this proceeding is the establishment of high cost funding that is explicit, competitively neutral, and fair to ILECs that have complied with regulatory mandates with the expectation that they would be compensated for their costs of building the best telecommunications network in the world. If ILECs do not recoup their legacy costs, and if universal service support is not based on the actual cost ILECs incur to provide universal service, the universal service plan will run afoul of the ILECs' constitutional right to be fully compensated for their costs of providing service. Setting the revenue benchmark based only on the services actually eligible for universal support is part and parcel of a program that ensures that providers receive support that adequately compensates them for their services.

Along with this critical issue, the Commission will have to make important determinations that preclude purchasers of below-cost unbundled network elements from receiving universal service support that exceeds the amount they pay for the elements; resist pressure to lower the Subscriber Line Charge; allow carriers to recover their costs of contributing to the universal service fund; and fairly implement the low income, schools and libraries, and health care provisions of

[23] We do not support using the federal universal service fund for such services, but we do support federal policy designed to bring states which have devoted little or no effort to the issue of disabled access to services up to baseline service levels.

Section 254. We appreciate the magnitude of the task the Commission has in front of it, and wish it well in its work.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Colin R. Petheram, hereby certify that copies of the foregoing "Comments of Pacific Telesis Group" were served by first class US mail, postage paid, upon the parties on the attached service list this 10th day of January, 1997.

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